

STATE OF MICHIGAN
MICHIGAN DEPARTMENT OF STATE
STATE HISTORIC PRESERVATION REVIEW BOARD

In the Matter of:
TIMOTHY B. SPRINGSTEAD,
Applicant/Appellant.

v

Docket No. 99-74-HP

DETROIT HISTORIC DISTRICT COMMISSION,
Respondent/Appellee.

FINAL DECISION AND ORDER

This matter involves an appeal of a decision of the Detroit Historic District Commission denying an application for approval for the construction of a front yard fence on property located at 1086 Burns, Detroit, Michigan.

The State Historic Preservation Review Board (the Board) has appellate jurisdiction to consider such appeals under section 5(2) of the Local Historic Districts Act, as amended, being section 399.205 of the Michigan Compiled Laws.

At the direction of the Board, an administrative hearing was held on April 22, 1999, for the purpose of receiving evidence and argument.

A Proposal for Decision was issued on May 21, 1999, and copies were mailed to all parties pursuant to section 81 of the Administrative Procedures Act, as amended, being section 24.281 of Michigan Compiled Laws.

The Board met to consider the appeal, along with the Proposal for Decision and all materials submitted by the parties, at its regularly scheduled meeting on June 4, 1999. The Board determined that it had insufficient time to adequately consider the exceptions filed in this matter, and voted to table consideration of the Proposal for Decision.

The board considered the appeal, along with the Proposal for Decision and all materials submitted by the parties, at its special meeting conducted on Tuesday, June 29, 1999.

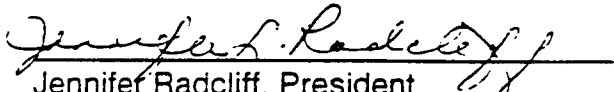
Having considered the Proposal for Decision and the official record made in this matter, the Board voted 5 to 0, with 1 abstention(s), to ratify, adopt, and promulgate the Proposal for Decision as the Final Decision of the Board, and to incorporate the Proposal into this document, and,

Having done so,

IT IS ORDERED that the appeal be and the same hereby is denied.

IT IS FURTHER ORDERED that a copy of this Final Decision and Order shall be transmitted to all parties as soon as practicable.

Dated: June 29, 1999


Jennifer Radcliff, President
State Historic Preservation Review Board

Note: Section 5(2) of the Local Historic Districts Act provides that a permit applicant aggrieved by a decision of the State Historic Preservation Review Board may appeal the Board's decision to the circuit court having jurisdiction over the commission whose decision was appealed to the Board. Under section 104(1) of the Administrative Procedures Act, such appeals must be filed with the circuit court within 60 days after the date of the mailing of notice of the Final Decision and Order of the Board. In addition, MCR 2.105(G) and 7.105 may prescribe other applicable rules with respect to appeals of decisions of administrative agencies.

STATE OF MICHIGAN
MICHIGAN DEPARTMENT OF STATE
ADMINISTRATIVE LAW DIVISION

TIMOTHY B. SPRINGSTEAD,
Applicant/Appellant,

v

Docket No. 99-74-HP

DETROIT HISTORIC DISTRICT COMMISSION,
Appellee.

PROPOSAL FOR DECISION

This matter concerns an appeal of a decision of the Detroit Historic District Commission (the Commission), denying an application for the construction of a four-foot high, wrought-iron fence along the front and side yards of the residential property at 1086 Burns Street. The property is situated in the City of Detroit's Indian Village Historic District.

The appeal was filed under section 5(2) of the Local Historic Districts Act (the Act).¹ Section 5(2) provides that any person aggrieved by a decision of an historic district commission may appeal the decision to the State Historic Preservation Review Board (the Review Board), which is an agency of the Michigan Department of State.

¹ 1970 PA 169, § 5; MCL 399.205; MSA 5.3407(5).

Upon receipt of the appeal, the Review Board directed the Michigan Department of State, Administrative Law Division, to convene an administrative hearing for the purpose of receiving evidence and taking arguments.

The Administrative Law Division conducted an administrative hearing on Thursday, April 22, 1999, in Hearing Room No. 121, the Mutual Building, 208 N. Capitol Avenue, Lansing, Michigan. The hearing was held pursuant to the procedures prescribed in Chapter 4 of the Administrative Procedures Act.²

The Appellant/property owner in this case, Timothy B. Springstead, appeared in person at the hearing. John S. Shelly, Attorney at Law, whose offices are located at 1139 Beaconsfield, #1, Grosse Pointe Park, Michigan, appeared on behalf of the Appellant. The Commission was represented by Gordon A. Haydett, Assistant Corporation Counsel, City of Detroit Law Department. Kenneth L. Teter, Jr., Administrative Law Examiner, Michigan Department of State, Administrative Law Division, presided at the hearing. Amy Arnold, Historic Preservation Planner, Michigan Historical Center, State Historic Preservation Office, attended as an observer/representative on behalf of the Board.

3 1969 PA 306, § 71 et seq; MCL 24.271 et seq; MSA 3.560(171) et seq.

Issues on Appeal

In a written Claim of Appeal, dated February 11, 1999, Mr. Springstead indicated that the Commission, at its meeting of December 9, 1998, had erroneously denied his request for approval of the installation of a wrought-iron fence along the front and side of his property. Appended to the appeal claim was a copy of a Notice of Denial, dated December 9, 1998, which the Commission sent to the Appellant. (Hearing Officer Exhibit No. 1)

At the hearing in this case and in a post-hearing brief, the Appellant asked that the Commission's decision be set aside and that the Review Board direct the Commission to issue a certificate of appropriateness to permit the installation of the fence. The Appellant argued that the Commission had acted arbitrarily and capriciously in three ways, namely: 1) that the Commission did not properly follow both federal and local standards and guidelines which pertain to the type of work proposed, 2) that the Commission ignored the fact that many other homes located in Indian Village had front yard fences, and 3) that the Commission simply followed an illegal "no front yard fence" policy that it had adopted in 1996.

The Commission disputed Springstead's factual and legal contentions, responding that the fence was neither historically fitting nor proper, that it was not acceptable under the city's history ordinance, and that constructing the fence would have an

adverse impact on the character of the Indian Village Historic District. The Commission added that the proposed fence would interfere with the district's "walls of continuity", that the replacement of hedges with a fence would clearly be an inappropriate and unacceptable change in visual appearance, and that the Commission had a duty to protect the integrity of the historic district as a whole.

Summary of Evidence

Under Michigan law, a party who occupies the position of a plaintiff or petitioner has the burden of proof in an administrative proceeding. 8 Callaghan's Michigan Pleading & Practice (2d ed), § 60.48, p 176; Prechel v Dep't of Social Services, 186 Mich App 547, 549; 465 NW2d 337 (1990); Lafayette Market and Sales Co v City of Detroit, 43 Mich App 129, 133; 203 NW2d 745 (1972). The Appellant (Springstead) clearly occupies that position in this matter and consequently bears the burden of proof.

A. The Appellant's Evidence

Section 5(2) of the Act, supra, indicates that appellants may submit all or any part of their evidence or argument in written form. In that vein, the Appellant submitted 13 exhibits to establish his factual assertions. Appellant Exhibit No. 1 was a copy of an enlarged color photograph of the house at 1086 Burns, depicting a view of the former hedge which once stood at the location where the proposed fence would be built. Appellant

Exhibit No. 2 was an enlarged color photograph of the house at 1086 Burns, which contains a superimposed artistic rendering of what the proposed fence would look like.

Appellant Exhibit No. 3 was a copy of a letter, dated December 6, 1998, sent from Lieutenant Dennis Fulton, Detroit Police Department, to Springstead indicating that the use of front yard fences are proven deterrents to crime. Appellant Exhibit No. 4 was a copy of a letter, dated December 8, 1998, sent from R. Thomas Vigliotti, President of a Detroit area real estate company, to the Historic Indian Village Association, which indicated that Vigliotti personally supported Springstead's fence proposal and that it "would be beautiful and enhance property values".

Appellant Exhibit Nos. 5 through 12 were copies of enlarged color photographs of the front yards of various houses situated in the Indian Village Historic District, which show the presence of or lack of hedges and/or fencing near their front sidewalks. Most of these photographs were taken of houses located on Burns Street to the south of Springstead's property. Appellant's Exhibit No. 13 was a handwritten map of Burns Street between Agnes Street and Jefferson Avenue, which was drawn by Springstead to illustrate the location of the houses shown in the photographs from Appellant Exhibit Nos. 5 through 9.

Besides submitting documentary evidence, Springstead personally testified at the administrative hearing. In brief, he

stated that his family became owners of the property at 1086 Burns Street around 1950, that he has lived there his entire life, and that he acquired full ownership of the house in the late 1980s. He also explained that his property sits on the southeast corner of Burns and Agnes, and that in early 1998, he removed the hedges running along the front sidewalks because they were in very poor condition.

Springstead indicated that a few months after removing the hedge, he decided to install a fence in its place. He stated that the purposes of the fence were: 1) to improve the property aesthetically, 2) to enhance the property's value, and 3) to provide increased security.

Springstead stated that he eventually selected a four-foot high, wrought-iron fence, that work began with the installation of the fence posts, but that work stopped when he was told Commission approval was required. He also described the conduct of the December 9, 1998 Commission meeting relative to an application that he had filed. He expressed the opinion that the proposed fence would be appropriate for his property and compatible with other homes in Indian Village Historic District, and he referred to numerous photographs to support his position.

B. The Commission's Evidence

The Commission also presented documentary evidence at the hearing. Commission Exhibit No. 1 consisted of an answer to the

Appellant's claim of appeal, accompanied by several sub-exhibits which consisted of a copy of virtually the entire file maintained by the Commission regarding the requested fence installation. The sub-exhibits included: (A) two copies of black and white photographs of the front yard of 1086 Burns, one view from the west and the other from the northwest, both taken on October 29, 1998; (B) a copy of a letter, dated October 30, 1998, from Commission staffperson Kristine Kidorf to Springstead informing him that his construction of a front yard fence required Commission approval, that he must submit an application, and that a violation notice may be issued; (C) a copy of a memorandum from the Commission's Chairperson, Stephen Vogel, to the City of Detroit's Buildings and Safety Engineering Department, requesting an inspection of 1086 Burns to determine if unauthorized exterior changes had been performed and requesting the issuance of a violation notice, if appropriate; and (D) a copy of an application for a Detroit building permit, which was signed by Springstead and dated November 19, 1998, requesting the erection of a wrought-iron fence, along with illustrations of the proposed fence.

The sub-exhibits in Commission Exhibit No. 1 also included: (E) three photographs, two showing the front yard of 1086 Burns and the presence of fence posts, and one showing the streetscape across the street from 1086 Burns; (F) a copy of a Notice of Public Hearing for the Commission's meeting scheduled for December 9,

1998, which listed Springstead's application on the agenda; (G) a copy of Chapter 25 of the Detroit Code, Historic Landmarks and Districts; (H) a copy of the Commission's Rules of Procedure; (I) a copy of a Staff Report on the proposed fence installation, which identified applicable design elements and provided a recommendation to deny approval; (J) a copy of a letter from William M. Worden, an Indian Village resident, to the Commission, received on December 3, 1998, which voiced opposition to the fence proposal.

The sub-exhibits in Commission Exhibit No. 1 also included: (K) and (L), copies of excerpts from the minutes of the Commission's December 9, 1998 meeting, as pertaining to the fence proposal; (M) a copy of the Local Historic District Act; (N) was a copy of the U.S. Secretary of Interior's Standards For Rehabilitation and Guidelines for Rehabilitating Historic Buildings; and (O) a copy of the Notice of Denial, dated December 14, 1998, sent by the Commission to Springstead.

In addition, Kristine Kidorf, a person who possesses considerable expertise in historic preservation matters and who serves as staff for the Commission, gave testimony on behalf of the Commission. Kidorf testified regarding her own involvement with Springstead's application, including her inspection of the property at 1086 Barnes and the preparation of a staff report which recommended not giving approval. She also described the prominent features exhibited by properties in the vicinity of 1086 Barnes, as

well as properties in other areas of the Indian Village Historic District. She acknowledged that a "wall of continuity" had been established by hedges adjacent the front sidewalks of homes along Burns, including the hedges which were removed from Springstead's property, and that the placement of a fence along that same line would maintain the "wall's" linear feature. However, she further indicated that a fence does not give the same visual appearance as a hedge or other vegetation, and that a change from one appearance to another would violate applicable federal and local standards and guidelines regulating historic districts.

Kidorf also explained the Commission's handling of the Appellant's application, including actions taken at the Commission meeting held on December 9, 1998. She described how the Commission applied the Secretary of Interior's Standards For Rehabilitation and corresponding guidelines, as well as local guidelines pertaining to elements of design for the Indian Village Historic District.

Kidorf expressed the view that the Commission probably would have approved some type of fence for 1086 Burns if it had been shown that a front yard fence had existed previously. She pointed out that the Commission had recently given serious consideration to approving the installation of a new fence on a property located on Iroquois Avenue because the property owner had asserted that there were signs that a prior fence had existed there; however, the

application was eventually denied after the owner failed to produce any evidence to verify the existence of the prior fence.

Findings of Fact

Based on the evidence presented during the administrative proceedings, the facts of this matter are found to be as follows:

A. Background of Indian Village Historic District

1. In 1970, the Indian Village Historic District was formally created as Detroit's second official historic district. It also received historic designations from both federal and state historic preservation agencies. The district extends north from the middle of East Jefferson Avenue for approximately one mile, to the middle of Mack Avenue. The district is approximately 1,200 feet wide and contains about 365 houses, almost all of which face Burns, Iroquois, Seminole, or East Jefferson Avenues. Altogether, 50 of the district houses presently have some form of front yard fencing. This represents some 13.7% of the district's properties.

2. In 1981, the City of Detroit adopted Ordinance 424-H,⁵ which defined and prescribed the particular "elements of design" which delineate and characterize the Indian Village Historic District. Among other things, the ordinance expressly addressed the relationship between significant landscape features and other

⁵ Ordinance 424-H, adopted in 1981, amended Detroit Code 1964, § 28A-1-14(c), and is currently codified as Detroit Ordinances, § 25-2-81.

surface treatments. With regard to fencing, the ordinance indicated both that the typical individual property should have a flat front lawn of grass turf and also that "ornamental front yard fences or hedges are not uncommon."⁴

3. Timothy Springstead, resides at 1086 Burns, which is located in the Indian Village Historic District. Springstead has been the owner since the late-1980s, but the home has been continuously owned by his family for nearly 50 years.

4. The home is located on the southeast corner of Burns and Agnes. There are six homes to the south of Springstead's property on the east side of Burns. On the west side of Burns, there is a total of nine homes south of Agnes. Most of these houses have hedges running along the front yard adjacent to the sidewalk, creating a distinctive line feature. One of the houses also has a cyclone fence set immediately behind the hedge.

5. Prior to 1998, Springstead's property also had hedge in front of the home adjacent to the sidewalk (facing Burns). The hedge also ran along the north side of the home (facing Agnes). This hedge had been in existence when the District was created in 1971. Along the south side there is a line of trees between Springstead's property and his neighbor.

⁶ Detroit Ordinances, § 25-2-81(13).

B. Hedge Removal and Proposed Fence Construction

6. In the spring of 1998, Springstead observed that the front yard hedge was "weathered", "beaten" and in poor shape, so he had it removed. At that time, the hedge was about 3½-feet tall.

7. A few months later, Springstead decided to install a fence in the front and side yards where the hedge had stood. He felt that a fence would serve three main purposes, those being: 1) to improve the property aesthetically, 2) to enhance the property's value, and 3) to provide increased security by discouraging people from cutting across the front yard.

8. After consulting with a designer, Springstead decided on a four-foot high, wrought-iron fence, and construction was started.

9. On or about October 29, 1998, Commission Staffer Kristine Kidorf received notice that construction of a new front yard fence had begun at 1086 Burns, which prompted her to visit the property later that day. During her visit, Kidorf observed exterior changes being made to the property, which included the partial construction of a new fence in the front yard, and she took photographs of the front of the property.

10. Kidorf then reviewed relevant City of Detroit records, determined that the Springstead was the owner of the property at 1086 Burns, and found that no building permit application for exterior construction at Springstead's property had been submitted to the Commission for review.

11. On October 30, 1998, Kidorf sent a letter to Springstead informing him of her observations on the previous day, and instructing him that, in order to comply with Section 25-2-18 of the 1984 Detroit City Code, he was required to submit an application for a building permit to the Commission. Her letter also informed him that she had asked the City of Detroit Buildings and Safety Engineering Department to inspect the property and to issue violations for any work being done without a permit.

12. Upon receipt of Kidorf's letter, Springstead immediately stopped the fence project, which by this time had consisted of the installation of fence posts. Springstead also prepared a building permit application.

13. On or about November 19, 1998, the Commission received an Application for Building Permit from Springstead, requesting approval to construct a "wrought iron fence (style F1) 4 ft. high going 25 ft. up Agnes and going approximately 80 ft across Burns".

14. On November 25, 1998, Kidorf visited the property at 1086 Burns in order to prepare a staff report to the Commission in consideration of the Appellant's application. During this visit, Kidorf took more photographs of the front exterior of the property. That same day, Kidorf sent Springstead written notice of the Commission's December 9, 1998 public hearing and meeting.

15. Kidorf then prepared a written report concerning Springstead's application, for the consideration of the Commission.

In the report, Kidorf wrote that:

A review of the designation slide indicates that a hedge existed in the location of the partially constructed fence. Judging by the lack of grass growth it appears that the hedge was recently removed without Commission approval. There is no evidence presented that a fence historically existed in the front yard location.

TREATMENT LEVEL AND ELEMENTS OF DESIGN

Indian Village Historic District is designated at the conservation treatment level.

The applicable portions of the elements of design include:

(12)

Walls of continuity. The major wall of continuity is created by the building, with their uniform setbacks within the blocks. Fences across side lots contribute to the major wall of continuity where placed at the front yard setback line.

(13)

Relationship of significant landscape features and surface treatment. The typical treatment of individual properties is a flat front lawn area in grass turf, often subdivided by a walk leading to the front entrance and sometimes with a walk at the side leading to the rear. Materials for such walks are concrete, brick, or stone, or combinations of those materials. Some front yards have rectangular raised earthwork terraces upon which the house stands. These unpaved terraces have sloping embankments or brick and/or stone retaining walls at the change of grade. Foundation plantings, often of a deciduous character, characteristic of the period 1895-1930, are present virtually without exception. Hedges between properties, and ornamental front yard fences or hedges are not uncommon. Side lots are not uncommon in the district, and a number of these form a part of the original site plan for the residence. Such side lots are usually landscaped, often fenced at or near the setback

line, and very occasionally contain paved areas such as a tennis court. The street right-of-way of eighty (80) feet combined with a pavement width of between twenty-four (24) and twenty-nine (29) feet creates wide "tree lawns" or berm areas, which adds to the generous ambiance of the urban landscape of the district. Street pavements are now asphalt; cut stone curbs still exist in portions of the district. Fencing ranges widely in type; fencing in public view was generally designed to compliment the style, design material, and date of the residence.

RECOMMENDATION

On June 6, 1996, the Detroit Historic District Commission adopted the following motion, "The Commission accept and adopt effective today the Indian Village Guidelines and adopt a policy of no front yard fences, no exceptions. This is based upon the evidential paperwork presented to us by the Indian Village Fence Committee headed by Mr. Cosgrove under the auspices of the Historic Indian Village Association.'

I recommend the commission deny the application for a front yard fence at 1086 Burns. The construction of a four foot high iron fence at the front and side sidewalks where one did not previously exist does not meet "The Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings" guidelines for district neighborhood where it is recommended, "Identifying, retaining, and preserving building, and streetscapes, and landscape features which are important in defining the overall historic character of the district or neighborhood. Such features can include streets, alleys, paving, walkways, street lights, signs, benches, parks and gardens, and trees." Walls of continuity at the building line with uninterrupted front lawns are a contributing feature to the district and the feature is not preserved if a fence is installed that disrupts the wall of continuity. The work does not meet "The Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings" standard number 9, "New additions, exterior alterations, or related new construction shall be differentiated from the old and shall be compatible with the massing, size, scale, and architectural features to protect the historic integrity of the property and its environment."

C. Commission Meeting and Decision

16. The Commission considered Springstead's application at its December 9, 1998 meeting. During the meeting, the Commission reviewed Kidorf's staff report. In addition, Kidorf spoke at the meeting to further explain her findings, as well as her recommendation that the Commission deny Springstead's application for a building permit for the proposed fence work.

17. Springstead attended the meeting and he spoke next. He explained that he was a lifelong resident of Indian Village and that he was familiar with the homes which comprise the Village, but that he was unaware that the Commission did not allow front yard fences. He pointed out that several homes in the Village had front yard fences and that one home on Seminole had erected a front yard fence sometime after the beginning of 1996. He further indicated that his purpose in building the fence was to enhance his house aesthetically and that he was not trying to create a barrier. He also presented a letter from a realtor, Thomas Viggliotti, which indicated that Springstead's proposed fence would enhance the value of his home and the neighborhood.

18. The Commission then allowed individuals in attendance from the public to offer comments. Four persons then spoke, all in favor of the fence proposal. They included: two neighbors who live

on Burns near Springstead's home; Springstead's mother, Virginia Springstead; and Springstead's attorney, John Shelly.

19. In response to an request from Shelly for a more detailed explanation, Kidorf stated that Standard 9 of the Secretary of the Interior Standards required that new construction be compatible with the massing, size, scale, and architectural features of the property. She noted that the property in this instance would be considered the entire historic district, not just this one piece of it. She further explained that she believed the proposed fence was not compatible with the scale or architectural features of either the district or 1086 Burns because the fence would disrupt the wall of continuity and because there was never historically a fence at that location.

20. After considering and discussing the merits of Springstead's application, including the written and oral comments received, Commissioner Patricia Linklater made a motion which provided:

"that the Commission deny the application for the front yard fence at 1086 Burns. The construction of a four foot high fence at the front and side sidewalks where one previously had not existed does not meet the Secretary of the Interior's Standard for Rehabilitation and Guidelines for Rehabilitating Historic Buildings guidelines for district/neighborhood where it is recommended to identify, retain and preserve building's streetscape."

21. Linklater's motion was supported by Commissioner Renee McDuffee, and was carried by a vote of 5-0.

22. On or about December 14, 1998, on behalf of the Commission, Kidorf sent Springstead a Notice of Denial regarding: a) the construction of a new front yard fence; and b) the reasons for denial of the application concerning the same. Among other things, the Notice indicated that:

At its regularly scheduled meeting on December 9, 1998, the Detroit Historic District Commission ("Commission") reviewed the above-referenced application for building permit. Pursuant to Section 25-2-24 of the 1984 Detroit City Code, the Commission hereby issues a notice of denial which is effective as of December 12, 1998. The Commission finds that the proposed work does not qualify for a certificate of appropriateness for the following reasons:

- 1) The walls of continuity at the building line with uninterrupted front lawns are a contributing feature to the district;
- 2) The installation of a four foot high iron fence at the front and side sidewalks where a fence did not previously exist interrupts the wall of continuity; and
- 3) The proposed work does not meet "The Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings" guidelines for district neighborhood where it is recommended, "Identifying, retaining, and preserving buildings and streetscape, and landscape features which are important in defining the overall historic character of the district or neighborhood. Such features can include streets, alleys, paving, walkways, street lights, signs, benches, parks and gardens, and trees.

Conclusions of Law

As indicated earlier in this proposal, section 5(2) of the Local Historic Districts Act, supra, allows any person aggrieved by a commission decision to file an appeal with the State Historic

Preservation Review Board. Section 5(2) also provides that the Review Board may affirm, modify, or set aside a commission's decision and may order a commission to issue a certificate of appropriateness or a notice to proceed. Relief should, of course, be ordered when a commission has, among other things, acted in an arbitrary or capricious manner, exceeded its legal authority, or committed some other substantial or material error of law. Conversely, where a commission has reached a correct decision, relief should not be granted.

During this proceeding, the Appellant asserted that the Commission had acted arbitrarily and capriciously in rendering its decision to deny his application. More particularly, the Appellant alleged that: 1) the Commission did not properly follow both federal and local standards and guidelines which are applicable to the type of work proposed, 2) the Commission ignored the fact that many other homes located in Indian Village had front yard fences, and 3) the Commission simply followed an illegal "no front yard fence" prohibition policy which it had adopted in 1996.

A. Applicable Historic Preservation Standards

In a case such as this, the criteria that a commission must use to act on an application concerning work affecting the exterior of a resource, either by approving or denying a certificate of

appropriateness, is set forth in section 5(3) of the Local Historic Districts Act.⁵ The section provides as follows:

Sec. 5. * * *

(3) In reviewing plans, the commission shall follow the U.S. secretary of the interior's standards for rehabilitation and guidelines for rehabilitating historic buildings, as set forth in 36 C.F.R. part 67. Design review standards and guidelines that address special design characteristics of historic districts administered by the commission may be followed if they are equivalent in guidance to the secretary of interior's standards and guidelines and are established or approved by the bureau. The commission shall also consider all of the following:

(a) The historic or architectural value and significance of the resource and its relationship to the historic value of the surrounding area.

(b) The relationship of any architectural features of the resource to the rest of the resource and to the surrounding area.

(c) The general compatibility of the design, arrangement, texture, and materials proposed to be used.

(d) Other factors, such as aesthetic value, that the commission finds relevant. (Emphasis added)

The Commission has maintained that approving the construction of the proposed fence would violate Standard 9 of the Standards for Rehabilitation of Historic Properties promulgated by the U.S. Secretary of the Interior.⁶ Standard 9 provides as follows:

(9) New additions, exterior alterations, or related new construction shall not destroy historic materials that characterize the property. The new work shall be differentiated from the old and shall be compatible with the massing, scale, and architectural features to protect the historic integrity of the property and its environment. (Emphasis added)

⁵ See footnote 1.

⁶ 36 CFR § 67.7.

In addition to Standard 9, Standard 6, which deals with repairing rather than replacing deteriorated materials, is also important to consider. Standards 6 state as follows:

(6) Deteriorated historic features shall be repaired rather than replaced. Where the severity of deterioration requires replacement of a distinctive feature, the new feature shall match the old in design, color, texture, and other visual qualities and, where possible, materials. Replacement of missing features shall be substantiated by documentary, physical, or pictorial evidence. (Emphasis added)

It is also instructive to take cognizance of written guidelines prepared by the U.S. Secretary of the Interior which are designed to implement the Standards. The specific guidelines referred to, which are applicable to exterior site features, provide as follows:

BUILDING SITE

Recommended

Identifying, retaining, and preserving buildings and their features as well as features of the site that are important in defining its overall historic character. Site features can include driveways, walkways, lighting, fencing, signs, benches, fountains, wells, terraces, canal systems, plants and trees, berms, and drainage or irrigation ditches; and archeological features that are important in defining the history of the site.

Retaining the historic relationship between buildings, landscape features, and open space.

Not Recommended

Removing or radically changing buildings and their features or site features which are important in defining the overall historic character of the building site so that, as a result, the character is diminished.

* * *

Recommended

Replacing in kind an entire feature of the building or site that is too deteriorated to repair - if the overall form and detailing are still evident - using the physical evidence to guide the new work. This could include an entrance or porch, walkway, or fountain. If using the same kind of material is not technically or economically feasible, then a compatible substitute material may be considered.

Not Recommended

Replacing an entire feature of the building or site such as a fence, walkway, or driveway when repair of materials and limited replacement of deteriorated or missing parts are appropriate.

Using a substitute material for the replacement part that does not convey the visual appearance of the surviving parts of the building or site feature or that is physically or chemically incompatible.⁷

The Commission also asserted that it acted in conformity with its own local ordinance and guidelines applicable to fences for historic districts. With regard to ordinance provisions, section 25-2-1 of Detroit's History Ordinance provides:⁸

Sec. 25-2-1. Purpose.

Historic preservation is declared to be a public purpose, and the city may regulate the construction, reconstruction, alteration, repair, moving and demolition of historic and architecturally significant structures within the limits of the city as provided in this article. The purposes of this article are to:

(1) Safeguard the heritage of the city by preserving areas in the city which reflect elements of its cultural, social, spiritual, economic, political or architectural history;

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Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings, U.S. Department of the Interior, pp 45 and 47 (rev 1990).

8 Detroit Ordinances, § 25-2-1.

- (2) Stabilize and improve property values in such areas;
- (3) Foster civic beauty and community pride;
- (4) Strengthen the local economy; and
- (5) Promote the use of historic districts for the education, pleasure and welfare of the citizens of the city, the state and of the United States of America.

The ordinance also indicates that before any work may be started within an historic district, an application must be submitted.⁹ The ordinance further provides that the Commission shall approve all applications for work determined to be appropriate for particular historic districts in Detroit,¹⁰ and in reviewing plans for certificates of appropriateness, shall, in relation to design treatment levels and elements of design, give consideration to:

- (1) The historical or architectural value and significance of the structure and its relationship to the historical value of the surrounding area;
- (2) The relationship of the exterior architectural features of such structure to the remainder of the structure and to the surrounding area;
- (3) The general compatibility of the exterior design, arrangement, texture, and materials proposed to be used;
- (4) Other factors, including aesthetic, which the commission deems to be pertinent.¹¹

The ordinance defines the term "design treatment levels" as categories of standards used by the Commission as general guides in determining the appropriateness of proposed work within a

9 Detroit Ordinances, § 25-2-18.

10 Detroit Ordinances, § 25-2-20.

11 Iden.

district.¹² The term "elements of design" has been defined to mean the characteristic relationships of the various Indian Village District features significant to the appearance of the district,¹³ and includes consideration of relationships between the following: materials, textures, colors and architectural details; walls of continuity; significant landscape features and surface treatments; open spaces to structures; orientations, vistas, and overviews; and general environmental character.¹⁴

The ordinance also identifies numerous specific and unique elements of design which pertain to the Indian Village Historic District. In that regard, the ordinance indicates in part as follows:

Sec. 25-2-81. Indian Village Historic District.

The defined elements of design for this district shall be as follows:

* * *

(13) Relationship of significant landscape features and surface treatment. The typical treatment of individual properties is a flat front lawn area in grass turf, often subdivided by a walk leading to the front entrance, and sometimes with a walk at the side leading to the rear. * * * Foundation plantings, often of a deciduous character, characteristic of the period 1889 - 1930, are present virtually without exception. Hedges between properties, and ornamental front yard fences or hedges are not uncommon. The American elm is virtually extinct in the district, though once the dominant tree. * * * The street

12 Detroit Ordinances, § 25-2-2.

13 Iden.

14 Iden.

right-of-way of eighty (80) feet combined with a pavement width of between twenty-four (24) and twenty-nine (29) feet creates wide "tree lawns" or berm areas, which adds to the generous ambience of the urban landscape of the district. * * * Fencing ranges widely in type; fencing in public view was generally designed to compliment style, design material, and date of the residence.¹⁵

B. Failure to Follow Historic Preservation Standards

Returning to the Appellant's specific grounds for appeal, the Appellant first contended that the Commission misapplied both federal and local standards and guidelines in reaching its determination that the fence was inappropriate. In particular, the Appellant charged that the Commission and its staff (i.e., Kidorf) incorrectly established his property's "wall of continuity" at the front setback of the house. Instead, the Appellant contends that the proper "wall of continuity" in this case is the precise location where he intends to construct the fence.

In support of his contention, the Appellant presented several photographs which show the existence of a prominent hedge-line running parallel with the front sidewalks of the rows of houses along both sides of Burns. The Appellant further established that the placement of the proposed fence would run along the same location and line of direction as the hedge-line.

In response, the Commission argued that the proposed fence project constituted new construction, which meant that the

¹⁵ See footnote 5.

resulting work must be compatible with the massing, size, scale, and architectural features of the property at 1086 Burns and the historic district as a whole. The Commission further contended that the use of a fence in place of hedges would represent an impermissible change in visual appearance.

Upon an examination of the arguments advanced by both parties, it is clear that the Commission's position is more persuasive. On the one hand, the Appellant does raise a valid point, in that a clearly defined linear symmetry is present in the area adjacent to the front sidewalks along Burns, including 1086 Burns. That symmetric line has been created by the existence of historic hedges. Moreover, it seems plausible that a fence would be just as capable of continuing that line (or wall of continuity) as do the hedges which are prominent in the district, especially on Burns.

On the other hand, however, one cannot ignore the fact that the visual appearance of any fence is drastically different than is hedge or other vegetation. The federal and local standards and guidelines, especially Standards 6 and 9 of the Secretary of the Interior's Standards for Rehabilitation and their implementing guidelines, provide that the replacement of a building site's features should be done using the same type material, and that the addition of a new feature that is incompatible must be avoided.

In the case of 1086 Burns, the deteriorated historic feature that was removed is hedge. Thus, the appropriate replacement

material was hedge; and was not another material completely different in appearance, such as a fence. Had the Appellant requested the re-introduction of hedges, or some similar vegetation, the federal standards and guidelines would clearly have permitted that work. Moreover, by using hedges, the Appellant could conceivably achieve the very goals he was after through the construction of a fence; namely, improvements to his property's aesthetics, value and security (i.e., prevent people from cutting across the front yard).

Based on the evidence presented, it is concluded that the Appellant's assertion that the Commission did not follow the law must be rejected.

C. Existence of Other Fences in District

The Appellant's second basis for appeal is the argument that other properties located in the Indian Village Historic District have ornamental front yard fences similar to the one he wants to erect at 1086 Burns. The Appellant contends that, since the other fences are legally permitted to exist, erecting new fences with like features is permissible and that he should also be allowed to build one.

To support this contention, the Appellant again presented photographs of properties in Indian Village Historic District. These pictures clearly depict front yard ornamental fences. In fact, one house situated to the south of Springstead's on Barns,

has a cyclone fence set immediately behind the hedge and the front sidewalk. In addition, Springstead also testified that such fences are in use in the District.

In response to the second appeal claim, the Commission first conceded that other District properties did in fact contain front yard fences. The Commission pointed out, however, that the number of houses with fences was relatively small (i.e., only 50 of 365 District properties, about 13.7%) and that the vast majority of fences appeared in neighborhoods away from 1086 Burns. The Commission also reiterated the fact that fence installation at 1086 Burns would violate applicable federal and local standards and guidelines pertaining to new construction.

Based on a review of the applicable law and the facts established in this record, it is determined that the established usage of front yard fences at other District houses is not controlling in this case. In short, the Appellant has failed to demonstrate that the existence of other fences necessarily means that a fence is appropriate and permissible for his property. The standards and guidelines that were analyzed earlier contain the criteria that must be followed by a commission when an application for any exterior work is under consideration. Again, the Commission's reliance on Standards 6 and 9 of the Secretary of the Interior's Standards for Rehabilitation and their implementing guidelines was justified. Consequently, the Appellant's assertion

that his fence should be approved because of the presence of other fences in the District must be rejected.

D. Illegal Policy Barring Fences

The Appellant's final basis for appeal was that the Commission based its decision on a "no front yard fence" prohibition policy, which had been in effect since 1996, and that the policy was illegal and contrary to the regulations the Commission was duty bound to follow.

To establish this particular claim, the Appellant relied on evidence indicating that on June 7, 1996, the Commission adopted in writing a blanket policy that strictly prohibited the erection of front yard fences in Detroit's historic districts. The Appellant also referred to the testimony of Kidorf, her staff report, and the minutes from the Commission's December 9, 1998 meeting, to show that the Commission evoked the policy in connection with his application.

The Commission, in reply, denied that the Commission has a set policy to automatically disapprove all requests for front yard fences. While the Commission did not deny the existence of the June 7, 1996 written policy, the Commission disputed the accuracy of the characterization of the policy as a blanket prohibition against fences. To the contrary, the Commission maintained that the policy was merely reflective of appropriate standards and guidelines regulating new additions and replacement features.

Indeed, a thorough review of the evidence presented in the record in this matter reveals that the Commission does not have a blanket prohibition policy and that it considered the Appellant's application in accordance with proper legal requirements. According to the testimony of Kidorf, the Commission recently gave serious consideration to approving the installation of a new fence on a property located on Iroquois Avenue because the property owner had asserted that there were signs that a prior fence had existed there. Although the application was eventually denied due to the owner's failure to produce any evidence to verify the prior fence, the Commission's handling of the Iroquois Avenue matter suggests a willingness to consider each application on its own merits. In that vein, it is noted that during the consideration of Springstead's application, Commission members and Kidorf took note of the fact that an historic fence had not existed at the property. Given the attention to the lack of a previous fence, one might surmise that if Springstead had demonstrated that a prior fence had stood in his front yard, then the Commission would likely have approved a fence proposal, in one form or another.

Inasmuch as the Commission did not follow a blanket prohibition policy at the time of the Commission's deliberations, it is concluded that the Appellant's contention is not well-founded.

Conclusion

The state and local laws cited above reflect legislative intent to protect, preserve and promote significant historic districts, buildings, structures, features, open spaces and characteristics. The Appellant's evidence did not demonstrate legal justification to install a four-foot high, wrought-iron fence around the front and sides of his property in the Indian Village Historic District.

In consideration of the entire official hearing record made in this case, it is concluded that the Appellant has failed to establish that the Commission erred when concluding that his proposed fence did not comport with current federal and local historic preservation standards and guidelines. It is further concluded that the Commission did not act arbitrarily or capriciously, did not violate state or local law, and did not act improperly under the Detroit History Code in denying the application at issue.

Recommendation

In consideration of the above, it is recommended that the appeal be denied.

Dated: May 21, 1999

Kenneth L. Teter, Jr.
Kenneth L. Teter, Jr. (P23898)
Administrative Law Examiner

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

TIMOTHY B. SPRINGSTEAD,
Petitioner,

CA No. 99-927123 AA

v.

Hon. Paul S. Teranes

DETROIT HISTORIC DISTRICT
COMMISSION,
Respondent.

OPINION

AT A SESSION OF SAID COURT
HELD IN DETROIT, MICH. ON **FEB 15 2000**

PRESENT: HON. **PAUL S. TERANES**

This is an appeal by the Petitioner, Timothy B. Springstead, from an opinion of the State Historic Preservation Review Board under the provisions of section 5 of the Local Historic Districts Act, MCL 399.205. The Review Board upheld the decision of the Administrative Law Examiner which affirmed the decision of the Detroit Historic District Commission, which decision denied the Petitioner's request to erect a wrought iron fence at his home at 1086 Burns in the City of Detroit.

The Petitioner's home is located on the Southeast corner of Burns and Agnes in the Indian Village Historic District. In 1971 Indian Village was designated as a historical district with a conservation design treatment level which means that comparable building materials should be used when implementing replacement construction in order to maintain the area's historical elements.

In 1998 the Petitioner removed shrubs from the front of his house and began replacement of

those shrubs with a wrought iron fence which would run twenty-five (25) feet along Agnes and eighty (80) feet across the front of his house at the sidewalk. Ms. Kristine Kidorf, a staff member of the Detroit Historic District Commission brought this information to the attention of the Commission. On December 9, 1998, a hearing was held before the Historic District of the City of Detroit at which time the Petitioner's request to allow a wrought iron fence to be built across the side and front of his house was denied. The Petitioner appealed this decision to the State Historic Preservation Review Board. Petitioner alleges that the State Historic Preservation Review Board erred in denying his request for a decorative wrought iron fence because this fence would be new construction and permissible under the Secretary of the Interior Standard No. 10. The Petitioner further claims that in 1996 the Indian Village Historic District adopted a policy to prohibit any front yard fences to be constructed in Indian Village which policy was over-restrictive for a conservation historic district.

A hearing before an Administrative Law Examiner of the State Historic Preservation Administration was held on April 22, 1999. The Administrative Law Examiner upheld the decision of the Historic District Commission finding that the wrought iron fence violated sections 6 and 9 of the Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings because the wrought iron fence was not of the same type and material as the previous hedge that went across the front of the Petitioner's home. The Administrative Law Examiner also found that the wrought iron fence disrupted the lesser wall of continuity along the sidewalks on Burns. The Administrative Law Examiner concluded that many of the homes on Burns had hedges along the sidewalks, and the wrought iron fence was so different in appearance that it changed the wall of continuity which ran along the sidewalk on Burns. The Administrative Law Examiner also found that the Indian Village Historic District policy concerning no fences in front of homes in Indian Village

was not a blanket policy which prohibited all fences, but was ruled upon on a case-by-case basis.

The Petitioner appealed the decision of the Administrative Law Examiner to the State Historic Preservation Review Board which upheld the decision of the Administrative Law Examiner. The Petitioner now appeals the decision of the Review Board to this Court.

MCL 24.306 sets forth the standard which this Court must use when reviewing a decision of a Board of Review of an administrative agency. MCL 24.306 states as follows:

- (1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:
 - (a) In violation of the constitution or a statute.
 - (b) In excess of the statutory authority or jurisdiction of the agency.
 - (c) Made upon lawful procedure resulting in material prejudice to a party.
 - (d) Not supported by competent, material and substantial evidence on the whole record.
 - (e) Arbitrary, capricious or clearly an abuse or unwarranted exercise of discretion.
 - (f) Affected by other substantial and material error of law.
- (2) The court, as appropriate, may affirm, reverse or modify the decision or order or remand the case for further proceedings.

The appellate courts of our state have restricted the discretion of the circuit court when reviewing a decision of a Board of Review of an administrative agency in determining whether the Board based its decision on competent, material, and substantial evidence on the whole record. In Parker v Board of Education of Byron Center Public Schools, 229 Mich App 565, 578 (1998), the Court of Appeals, citing Tomczik v. State Tenure Comm., 175 Mich App 495, 499 (1989), stated, "Substantial evidence is that which a reasonable mind would accept as adequate to support a decision; it is more than a scintilla but may be substantially less than a preponderance."

The courts have also made it clear that a reviewing court cannot substitute its opinion for that of the Board of Review. In Kurzyniec v Michigan Department of Social Services, 207 Mich App 531

(1994), the Court of Appeals citing Black v. Department of Social Services, 195 Mich App 27, 30 (1992), stated, "When there is sufficient evidence, a reviewing court may not substitute its discretion for that of the administrative tribunal even if the court might have reached a different result." The Kurzyniec Court citing Marrs v. Bd. of Medicine, 422 Mich. 688, 693-694 (1985), further stated, "To reverse an administrative agency's decision as an abuse of discretion under MCL § 24.306(1)(e) ... a court must find a result so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias."

In its decision the Board of Review adopted the rationale of the Administrative Law Examiner in finding that the wrought iron fence was a replacement of the preexisting hedges and not new construction as argued by the Petitioner. Since there was testimony that the Petitioner formerly had hedges along the sidewalk on the front and side of his home, this Court cannot find that the Administrative Law Examiner or Board of Review erred in determining that the wrought iron fence was a replacement for the hedges and, therefore, subject to Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings sections 6 and 9, and City of Detroit Ordinance 25-2-81. These standards and ordinance require that replacement of building site features be done with the same type of materials. A wrought iron fence is of a different material and overall structure from a hedge.

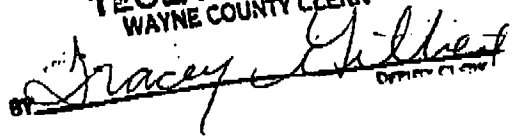
This Court finds that the Review Board's decision, that the lesser wall of continuity along the sidewalk on Burns is disrupted by the construction of a wrought iron fence where the homes on Burns that have a lesser wall of continuity have hedge along the sidewalk, is not arbitrary or capricious.

Finally, the decision of the Board of Review that the policy of Indian Village Historic District to prohibit front yard fences is not an absolute prohibition against front yard fences is supported by

competent, material, and substantial evidence on the whole record. The Board of Review relied upon testimony before the Administrative Law Examiner which indicated that in 1998 the Historic District allowed the building of a front yard fence on Iroquois in the Indian Village. This one exception to the rule is sufficient to establish that the prohibition against front yard fences in Indian Village is not absolute.

Even though many may have empathy with the Petitioner and his desire to erect a wrought iron fence along the sidewalk on Agnes and Burns in front of his house in order to give more privacy and to keep people from cutting across his lawn, this Court cannot find that the decision of the Board of Review of the State Historic Preservation Administration was violative of law or based on evidence which was not competent, material, and substantial on the whole record, or was arbitrary or capricious. Although parties may differ, the testimony before the Historic District, the Administrative Law Examiner, and the State Historic Preservation Board of Review supported the decision which prohibits the Petitioner from erecting a wrought iron fence in front of his property at 1086 Burns in the City of Detroit. Therefore, this Court will affirm the decision of the State Historic Preservation Board of Review.


CIRCUIT COURT JUDGE

A TRUE COPY
TEOLA P. HUNTER
WAYNE COUNTY CLERK
BY  OFFICE CLERK

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

TIMOTHY B. SPRINGSTEAD,
Petitioner,

v.

DETROIT HISTORIC DISTRICT
COMMISSION,
Respondent.

CA No. 99-927123 AA

Hon. Paul S. Teranes

ORDER

AT A SESSION OF SAID COURT HELD IN DETROIT, MICH. ON FEB 15 2000

PRESENT: HON. PAUL S. TERANES

This matter having come by appeal from the State Historic Preservation Board of Review's decision upholding the Administrative Law Examiner's decision prohibiting the Petitioner from erecting a wrought iron fence along the sidewalks of Agnes and Burns in front of his home at 1086 Burns in the City of Detroit, and briefs having been filed, and oral argument having been heard:

IT IS HEREBY ORDERED THAT the decision of the State Historic Preservation Board of Review denying Petitioner's, Timothy B. Springstead's, request to erect a wrought iron fence along the side and in front of his home at 1086 Burns in the City of Detroit, be and the same is affirmed for the reasons as stated in the attached opinion.

A TRUE COPY
TEOLA P. HUNTER
WAYNE COUNTY CLERK

BY Tracy Hillert
CLERK

Paul S. Teranes
CIRCUIT COURT JUDGE